Team R12

No. 4-422

IN THE SUPREME COURT OF THE UNITED STATES

Jayne Austin,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF ISSUES PRESENTED

1. Whether the driver of a rental vehicle lacks standing to contest the search of that vehicle when the driver has rented the vehicle in another person's name, without that person's permission, and where she has possessed it for a limited period of time.

2. Whether the government's acquisition of the location data of a rental vehicle—which is provided by an individual to the rental company as a condition of the rental—is a "search" within the meaning of the Fourth Amendment.

STATEMENT OF FACTS

Between October and December of 2018, five *Darcy and Bingley Credit Union* branches were robbed. R. at 3. Four of the robberies took place in California, and one in Nevada. R. at 3.

On January 3, 2019 Petitioner Jayne Austin rented a 2017 Black Toyota Prius with the license plate R0LL3M (the "Prius") through the popular car rental software application YOUBER. R. at 2. That same day, yet another *Darcy and Bingley Credit Union* was robbed. R. at 3. A surveillance camera outside the bank showed a 2017 Black Toyota Prius leaving the scene of the robbery with a YOUBER sticker and a partial license plate match. R. at 3. The video further showed the suspected bank robber wielding a .45 caliber handgun and concealing his or her face with a maroon ski mask. R. at 3. When Petitioner was stopped later that day while driving the Prius, officers recovered a maroon ski mask, a BB gun disguised to look like a .45 caliber handgun, and $50,000 in cash. R. at 3.

Petitioner did not use her own YOUBER account to rent the Prius. R. at 2. She didn't even have a YOUBER account, preferring to live "off the grid." R. at 18. Instead, she used the account of her estranged girlfriend, Martha Lloyd. R. at 2. Ms. Lloyd created her account in July 2018, six months prior to the robbery. R. at 2. During their "on-and-off-again" relationship, Petitioner periodically used Ms. Lloyd's YOUBER account and reimbursed her in cash. R. at 2.

But Ms. Lloyd and Petitioner had broken up in September 2018—four months before the January 3 robbery. R. at 18. Ms. Lloyd never gave Petitioner permission to continue using the account after their breakup. R. at 19. In fact, Ms. Lloyd had no idea that Petitioner was still using her YOUBER account. R. at 20. Though Ms. Lloyd had not changed her YOUBER account information and did not specifically communicate to Petitioner that she did not have permission to continue using the YOUBER account, she did not know that Petitioner continued to use it. R. at

20. Ms. Lloyd had switched to a different ridesharing application—BIFT—and therefore did not see that Petitioner had continued to take advantage of the account without Ms. Lloyd's permission. R. at 20.

On January 3, 2019, Petitioner was stopped while driving the Prius for failure to stop at a stop sign. R. at 2. During the traffic stop, Petitioner showed the officer the rental receipt from YOUBER. R. at 2. The officer noticed that Petitioner's name was not listed as an authorized renter under the rental agreement. R. at 2. Because the officer believed he did not need Petitioner's consent to search the car, he opened the trunk of the car. R. at 3. Along with the maroon ski mask, the BB gun, and the duffel bag of $50,000 in cash, the officer recovered clothes, an inhaler, three pairs of shoes, a collection of signed Kendrick Lamar records, and a cooler containing tofu, kale, and homemade kombucha. R. at 3. In the backseat he found bedding and a pillow. R. at 3. During this investigation, the officer learned about the recent bank robbery, and arrested Petitioner upon discovering that the robbery was perpetrated by a suspect who wore a maroon ski mask while wielding what appeared to be a .45 caliber handgun, and who drove away in a YOUBER vehicle matching the Prius's description. R. at 3.

The detective investigating Petitioner's case discovered that the modus operandi of the January 3 robbery matched that of the five unsolved robberies of *Darcy and Bingley Credit Union* from late 2018. R. at 3. Surveillance footage revealed that the same YOUBER vehicle was used in four out of the five robberies, and that a different YOUBER vehicle was used in the fifth robbery. R. at 3. The detective, knowing that Petitioner was apprehended in a YOUBER vehicle, served a subpoena on YOUBER to obtain the location data collected by YOUBER connected to Ms. Lloyd's account. R. at 3.

As a matter of course, YOUBER tracks the location of every vehicle that it rents. R. at 3. While every YOUBER vehicle transmits its location to YOUBER every two minutes, this location is not connected with an account until a user rents a vehicle and enters it with his or her mobile phone. R. at 3–4. YOUBER tracks each vehicle in the ordinary course of business using GPS technology and Bluetooth signals from each user's cellphone in order to ensure that no one other than the registered renter operates YOUBER vehicles, and in order to ensure the security of its vehicles. R. at 3–4. These signals are transferred by YOUBER's mainframe, and filtered through the search engine Smoogle in order to produce a timestamped location. R. at 4.

YOUBER complied with the subpoena and provided the location information related to Ms. Lloyd's account. R. at 3. Upon inspecting the data which YOUBER had collected pursuant to its policy, the detective determined that Petitioner had committed the robberies in question, and recommended that she be charged with six counts of bank robbery under 18 U.S.C. § 2113. R. at 4.

Ahead of trial, Petitioner filed two motions to suppress evidence on Fourth Amendment grounds. R. at 4. The district court denied both motions. R. at 4. The court held that Petitioner lacked standing to challenge the search of her rental vehicle due to her temporary and limited relationship with that vehicle, and accordingly, that the evidence obtained from the search did not contravene the Fourth Amendment. R. at 6. It further held that, notwithstanding Carpenter v. United States, 138 S. Ct. 2206 (2018), the location data obtained from YOUBER was not protected by the Fourth Amendment because it did not reveal the intimacies of life and because Petitioner used the vehicle in the public sphere. R. at 7–8. Petitioner was convicted on all six counts of bank robbery. R. at 7–8.

Petitioner appealed the denial of her motions to suppress to the United States Court of Appeals for the Thirteenth Circuit. R. at 10. The Thirteenth Circuit affirmed the trial court on the first motion because, as she had not secured permission to use Ms. Lloyd's account, Petitioner was neither legitimately present in the rental vehicle nor did she have a valid property interest in it. R. at 10–12. The Thirteenth Circuit then affirmed the second motion because Petitioner voluntarily revealed her location information to YOUBER, thus depriving it of the protections of the Fourth Amendment. R. at 13–15.

SUMMARY OF THE ARGUMENT

1. First, this Court should affirm the decision of the U.S. Court of Appeals for the Thirteenth Circuit to deny Petitioner's motion to suppress evidence obtained from the search of her rental vehicle because Petitioner has failed to meet her burden to establish standing to contest the search. First, Petitioner did not have a reasonable expectation of privacy in the rental vehicle, which she rented in another person's name and without that person's permission. This Court should adopt the bright-line rule used by the Eighth and Ninth Circuits that if a person is not an authorized driver under the rental agreement, he or she must show explicit permission from the named renter to use the vehicle in order to establish standing. Second, Petitioner has not established standing by showing a lawful property interest in the vehicle. Though one's possession and control of an item can be used to establish standing, this Court's precedent makes clear that the possession and control must be lawful. Here, given the fact that Petitioner rented the vehicle in Ms. Lloyd's name and without Ms. Lloyd's permission, her possession of the vehicle may have been unlawful. Thus, Petitioner has failed to meet her burden to establish standing.

2. Second, this Court should affirm the decision of the U.S. Court of Appeals for the Thirteenth Circuit to deny Petitioner's motion to suppress evidence obtained by law enforcement from YOUBER because Petitioner has failed to demonstrate that she had a reasonable expectation of privacy in the location data that she disclosed to YOUBER. First, Petitioner failed to demonstrate that she had a subjective expectation of privacy in her GPS location which she transmitted to YOUBER as a condition of renting a YOUBER vehicle, because her conduct indicated her awareness that the YOUBER account would be monitored. Second, even if Petitioner did have a subjective expectation of privacy in the location data, it is not an expectation that society would recognize as reasonable under the third-party doctrine because she voluntarily exposed the information to a third party—YOUBER. Finally, even if this Court finds that the third-party doctrine does not apply to this case, the government's inspection of Petitioner's location data obtained from YOUBER still would not constitute a search due to the reduced expectation of privacy that individuals possess in the contents and whereabouts of automobiles.

STANDARD OF REVIEW

This Court reviews a district court's denial of a motion to suppress de novo. United States v. Gomez, 16 F.3d 254, 256 (8th Cir. 1994). Factual determinations related to standing, however, should be reviewed under a clearly erroneous standard. Id.

ARGUMENT

I. PETITIONER HAS NOT MET HER BURDEN TO ESTABLISH STANDING TO CHALLENGE THE SEARCH OF THE VEHICLE THAT SHE RENTED IN ANOTHER PERSON'S NAME AND WITHOUT THAT PERSON'S PERMISSION BECAUSE SHE HAS NEITHER A REASONABLE EXPECTATION OF PRIVACY NOR A LAWFUL PROPERTY INTEREST IN THE VEHICLE.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." U.S. Const. Amend. IV. Under this Court's jurisprudence, people may only bring Fourth Amendment challenges to unreasonable searches of *their* effects, and not the effects of any other person. See id. Accordingly, this Court has long held that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." Rakas v. Illinois, 439 U.S. 128, 128 (1978) (quoting Alderman v. United States, 394 U.S. 165, 174 (1969)).

Though in the past this Court recognized standing to challenge a Fourth Amendment violation for anyone "legitimately on [the] premises where a search occurs," Jones v. United States, 362 U.S. 257, 267 (1960), this Court rejected that broad principle in Rakas v. Illinois. Rakas, 439 U.S. at 138–39. The Rakas Court held that to establish standing, not only must one be lawfully on the premises, but one must also show a substantive Fourth Amendment violation. Id. (holding that standing is "more properly subsumed under substantive Fourth Amendment doctrine"). Thus, to establish standing, one must show that either a reasonable expectation of privacy or a lawful property interest has been violated. See Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (finding that Fourth Amendment applies where one has a reasonable expectation of privacy); see also Florida v. Jardins, 569 U.S. 1, 11 (2013) (noting that the Katz test supplements, rather than displaces, the traditional property-based understanding of the Fourth Amendment). This Court has recently noted that "property concepts are instructive in determining the presence or absence of the privacy interests protected by the [Fourth] Amendment." Byrd v. United States, 138 S. Ct. 1518, 1526 (2018). But, the Court noted that one's possession and control of an item alone is not enough to establish standing—the possession and control must be lawful. See id.

The proponent of a motion to suppress has the burden of establishing standing. United States v. Sanchez, 943 F.2d 110, 113 (1st Cir. 1991) (citing Rakas, 439 U.S. at 130 n.1); see also Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) ("Petitioner, of course, bears the burden of proving not only that the search of [the] purse was illegal, but also that he had a legitimate expectation of privacy in that purse."). In the instant case, the Court should affirm the decision of the Thirteenth Circuit because Petitioner failed to meet her burden to establish standing. She has shown neither a reasonable expectation of privacy nor a lawful property interest in the YOUBER rental vehicle.

A. Petitioner has not met her burden to establish standing because she has not established a reasonable expectation of privacy in the rental vehicle.

Petitioner does not have standing to contest the search of the rental vehicle because not only was she not listed on the rental agreement, she has not shown that she had permission from the named renter to use the car. This Court recently held that the driver of a rental vehicle need not be listed on the rental agreement to have a reasonable expectation of privacy in the vehicle. See Byrd, 138 S. Ct. at 1531. The question of how a driver not listed on a rental agreement might establish standing, however, was left open. See id. This Court should adopt the bright line rule used by the Eighth and Ninth Circuits: if one is not an authorized driver under the rental agreement, then one must show explicit permission from the named renter in order to establish standing. See United States v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006) ("[A]n unauthorized driver[] only has standing to challenge the search of a rental automobile if he received permission to use the rental car from the authorized renter."); United States v. Muhammad, 58 F.3d 353, 355 (8th Cir. 1995) ("[The defendant] needed to make some additional affirmative showing of consensual possession to satisfy the standing requirements."). Though a few courts have used a totality of the circumstances test and examined factors such as the relationship between the defendant and the named renter, the defendant's previous uses of the item, and the defendant's subjective expectation

of privacy in the item, none of these factors weigh heavily enough to overcome the lack of permission from the named renter. See, e.g., United States v. Gomez, 16 F.3d 254, 256 (8th Cir. 1994); Sanchez, 943 F.2d at 113.

The bright line rule is consistent with the Court's reasoning in Byrd v. United States. See 139 S. Ct. at 1529. There, Byrd and the named renter drove together to a Budget car rental facility. See id. at 1524. Byrd stayed in the parking lot while the named renter went into the Budget office and rented a car. Id. The named renter came back outside, gave Byrd the keys to the newly-rented car, and watched him drive off in it. Id. Thus, Byrd clearly had the named renter's permission to drive the rental car, even though he was not listed on the rental agreement. See id. The Court found that Byrd had standing to challenge a search of the vehicle, and relied on the fact that the named renter had given him permission to use the car and that therefore his possession of the vehicle was "innocuous." See id. at 1529. The Court went on to suggest that another instance where an unauthorized driver might have standing would be when "the renter is drowsy or inebriated and the two think it safer for the friend to drive them to their destination." Id. In such a situation, however, the driver would have permission from the renter. See id. The Court contrasted these instances with a situation where the driver did not have permission from the named renter—a car thief—and held that the car thief would not have standing. See id. In Byrd, therefore, this Court drew a line between instances where a driver has permission from the renter—i.e. the possession is "innocuous"—and instances where the driver has taken the vehicle without the renter's permission. See id.

Because permission from the named renter is such a crucial factor, several courts have held that permission must be explicit. For example, in United States v. Muhammad, the Eighth Circuit held that because the defendant had presented no "direct evidence" showing he had been granted

permission to use the vehicle, he had failed to establish standing. 58 F.3d at 354. There, the defendant was stopped while driving a car leased in another person's name. Id. The defendant was not listed as an authorized driver on the lease agreement. Id. While searching the car, officers found cocaine in the trunk and arrested the defendant. Id. at 354–55. The defendant presented no evidence that he had explicit permission from the named renter to use the car, but argued that the lack of evidence that the car was stolen should give rise to an inference of consensual possession. Id. at 355. The court disagreed. Id. It held instead that the defendant must make an "affirmative showing of consensual possession to satisfy the standing requirements." Id.; see Thomas, 447 F.3d at 1199 (following the rule the Eighth Circuit developed in Muhammad); see also Gomez, 16 F.3d at 256 (noting that "casual possession" of a car is insufficient; the driver must have "direct authority" from the owner to use the car to establish standing).

In the present case, as in Muhammad, Petitioner failed to show permission from Ms. Lloyd to use the vehicle. See 58 F.3d at 354. The lower court found that Ms. Lloyd did not give Petitioner explicit permission to rent the car in her name. R. at 10. Rather, without Ms. Lloyd's consent or even knowledge, Petitioner rented a car using her name, account, and credit card. R. at 19–20. As in Muhammad, the lack of evidence that the vehicle was stolen cannot give rise to an inference that Ms. Lloyd had implicitly granted Petitioner permission to rent and operate the vehicle. See 58 F.3d at 354. Alleged implicit permission is not sufficient to establish standing. See id. Rather, it is Petitioner's burden to establish a reasonable expectation of privacy, and thus permission cannot be inferred from a mere absence of evidence that the car was stolen. See Rakas, 439 U.S. at 130 n.1; Muhammad, 58 F.3d at 354. Further, in Byrd the Court relied exclusively on Byrd's receipt of explicit permission from the named renter to cure the fact that he was not an authorized driver

under the rental agreement. See 138 S. Ct. at 1529. Thus here, Petitioner's lack of permission from Ms. Lloyd should be dispositive on the issue of standing. See id.

Petitioner's relationship with the named renter, her historical use of the vehicle, and her potential subjective expectation of privacy in the vehicle also do not suffice to establish standing. First, Petitioner's relationship with Ms. Lloyd is far too fraught and intermittent to support a finding of standing by this Court. See R. at 18. Petitioner and Ms. Lloyd were in an "on-and-off-again" relationship, but broke up in September of 2018—four months before the search. See R. at 18. During their relationship, Petitioner used Ms. Lloyd's YOUBER account, but she did not ask for permission to continue using the account after the breakup. See id. at 18–20. Though Ms. Lloyd had not yet changed her account information, she was not aware that Petitioner continued to use the account without her permission after the break up. Id. at 19–20. The uncertain, sporadic relationship between two people who had dated in the past is clearly distinguishable from the sorts of "intimate relationships" other courts have found probative of standing. See, e.g., United States v. Smith, 263 F.3d 571, 582 (6th Cir. 2001) (holding that the fact that defendant and named renter were married—combined with explicit permission and multiple other factors—established standing). As the District Court in this case noted, "[t]he volatility of the relationship between the two women gives this Court great pause." R. at 6.

Second, Petitioner's limited previous uses of the Prius do not demonstrate standing. Though a few courts have considered a defendant's historical use of an item in the standing analysis, see, e.g., Sanchez, 943 F.2d at 113, here Petitioner's occasional past uses of both Ms. Lloyd's account and the Prius are not sufficient. Ms. Lloyd only set up her YOUBER account on July 27, 2018—not even six months before the search took place in January 2019. R. at 2. Petitioner had used the account for no longer than six months. See id. Further, though Petitioner

had rented the same Prius when perpetrating four of the five other robberies that she committed between October and December of 2018, each of these possessions was fleeting: YOUBER only allows users to rent cars for up to one week or up to 500 miles. See R. at 2, 4. Thus, Petitioner never possessed the Prius for any prolonged period. See R. at 2, 4. Additionally, on the day of search, Petitioner had possessed the Prius for a matter of mere hours. See R. at 2. She did not have a sufficiently sustained relationship with the Prius—or even with Ms. Lloyd's relatively new YOUBER account—to establish standing.

Third, the fact that Petitioner had various personal items in the Prius does not affect this analysis. During his search of the car, the officer discovered that along with the $50,000 in cash, the ski mask, and the BB gun disguised as a .45 caliber handgun, Petitioner had a pillow, bedding, clothes, an inhaler, shoes, signed records, and a cooler of food. R. 3. This Court has long recognized that there is a reduced expectation of privacy in vehicles. See, e.g., Byrd, 138 S. Ct. at 1526 ("[T]here is a diminished expectation of privacy in automobiles."). Simply putting bedding and a pillow in your car does not alter the long-standing rule. See id. To find standing exists in an instance where Petitioner had such an uncertain and erratic relationship to the property searched would be not only inconsistent with this Court's precedent, it would bewilder lower courts with how to determine standing in future cases.

B. Further, Petitioner has not met her burden to establish standing because she has not shown a lawful property interest in the rental car.

Petitioner's possession and control of the rental car do not establish standing because she has failed to show that her possession was lawful. Though a property interest can in some cases establish standing, this Court's precedent makes clear that such an interest must be lawful. See Byrd, 138 S. Ct. at 1529; Rakas, 439 U.S. at 430 n.12. In Rakas, this Court noted that a "burglar plying his trade in a summer cabin during the off season" does not have standing because his

presence there is "wrongful." 439 U.S. at 430 n.12. Byrd reaffirmed this rule, stating that "[n]o matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car." 138 S. Ct. at 1529 (citing Rakas, 439 U.S. at 430 n.12). The Court stated plainly that "a person present in a stolen automobile at the time of the search may [not] object to the lawfulness of the search of the automobile." Id.

But unlawfulness is not limited to theft. For example, in United States v. Lyle, the Second Circuit focused on the fact that the defendant did not have a valid driver's license, and therefore it was unlawful for him to operate the vehicle. 919 F.3d 716, 729 (2nd Cir. 2019). There, the defendant was stopped by law enforcement as he was exiting a car. Id. at 723. When asked for identification, the defendant produced an expired license. Id. Officers noted that the vehicle was a rental car, and that the defendant was not an authorized driver on the rental agreement. Id. At the suppression hearing, the defendant asserted that his girlfriend had rented the car and given him permission to drive it. Id. at 725. The Second Circuit found that the defendant lacked standing to challenge the search because not only was he not authorized under the rental agreement, but also because he was unlicensed. Id. at 729. It focused on the fact that for him to operate the vehicle without a license was illegal under state law. Id. The court analogized defendant's unlawful operation of the motor vehicle to theft, and held that because the defendant's operation of the motor vehicle rendered his possession and control unlawful, he lacked standing. Id. at 729.

As with any other assertion of standing, the defendant carries the burden of showing that his or her possession and use of an item is lawful. See United States v. Ponce, 947 F.2d 646, 648 (2nd Cir. 1991). For example, in United States v. Ponce, the defendants were stopped while driving a car registered in someone else's name. Id. After impounding the vehicle and obtaining a search warrant, law enforcement found cocaine, two weapons, and cash. Id. at 648. The Second Circuit

held that the defendants had failed to meet their burden to show lawful possession of the car. Id. at 649. It held: "[m]ore importantly, the burden is not on the police to show that defendants were in the car illegitimately. The burden is on the defendants to show a legitimate basis for being in the car . . . ." Id. at 649.

In the present case, Petitioner did not meet her burden to show that her possession and control of the rental car was lawful. See id. Even though there may not be sufficient evidence that Petitioner stole the vehicle, her conduct likely falls under one of the countless state criminal statutes prohibiting using a motor vehicle without authority or renting a car in someone else's name. See, e.g., B. Finberg, *Automobiles: Elements of Offense Defined in "Joyriding" Statutes*, 9 A.L.R. 633 (1966) (collecting criminal joyriding cases across states and noting that the offense generally refers to the unlawful taking, using, or operating of a motor vehicle without the consent of the owner); see also Frederick E. Felder, Jr., *Criminal Offenses in Connection with Rental of Motor Vehicles*, 28 A.L.R.3d 949 (1971) (citing cases for theft by false impersonation or pretenses where the accused rented and obtained possession of an automobile by falsely representing himself as being another person); R. at 12. In light of these potential criminal offenses, Petitioner has failed to meet her burden to show that she lawfully possessed the car. See Ponce, 947 F.2d at 648. Petitioner need not have stolen the vehicle for her to lack standing. Rather, any illegality in connection with her use or possession of the vehicle would be sufficient. See, e.g., Lyle, 919 F.3d at 729 (operating vehicle without a valid license). Further—and more importantly—it is not the government's burden to show that Petitioner lacked standing. See Ponce, 947 F.2d at 648. It is Petitioner's burden to show that her presence in the vehicle was lawful. See id. The uncertainty surrounding Petitioner's "on-and-off-again" relationship with Ms. Lloyd coupled with the lack of explicit permission to use Ms. Lloyd's YOUBER account preclude Petitioner from meeting that

burden. R. at 2, 18–20. Thus, Petitioner does not have standing to challenge the search of the YOUBER vehicle.

II. THE GOVERNMENT'S ACQUISITION OF THE LOCATION DATA OF PETITIONER'S RENTAL VEHICLE IS NOT A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT, BECAUSE PETITIONER DOES NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THAT DATA.

The Fourth Amendment protects individuals against unreasonable searches and seizures. U.S. Const. Amend. IV. In Katz v. United States, this Court acknowledged that the Fourth Amendment "protects people, not places" and held that certain reasonable expectations of privacy are protected independently from any notion of trespass. 389 U.S. 347, 351 (1967); see Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018). The second Justice Harlan, in his concurrence in Katz, wrote that a government intrusion constitutes a search within the meaning of the Fourth Amendment when it violates (1) "an actual (subjective) expectation of privacy"; which (2) "society is prepared to recognize as 'reasonable.'" 389 U.S. at 361; see also Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting Justice Harlan's two-part approach to the legitimate expectation of privacy inquiry). With respect to the location data that she provided to YOUBER, Petitioner had neither a subjective expectation of privacy, nor one which society would recognize as reasonable. See R. at 18–19, 29–30. That she had no subjective expectation of privacy in that data is shown by Ms. Lloyd's testimony stating that Petitioner refused to use her own information to sign up for YOUBER, demonstrating that Petitioner was aware that the YOUBER account would be monitored. See R. at 18–19. And, even if Petitioner were deemed to have had a subjective expectation of privacy in location records held by YOUBER, it is not one which society would recognize as "reasonable" under the third-party doctrine. See R. at 29–30 (outlining YOUBER's use of location data); Smith, 442 at 743–44 (holding there is no legitimate expectation of privacy

in information voluntarily revealed to others). Finally, even assuming, *arguendo*, that the third-party doctrine does not apply to this case, Petitioner still had no reasonable expectation of privacy in her location information because individuals possess a diminished expectation of privacy in automobiles. See United States v. Knotts, 460 U.S. 276, 281 (1983). Accordingly, the government's inspection of the location data of Petitioner's rental vehicle was not unreasonable, and therefore did not fall within the protection of the Fourth Amendment.

A. By insisting on using Ms. Lloyd's personal information in order to utilize YOUBER, Petitioner exhibited that she had no subjective expectation of privacy in her rental vehicle's location data.

In order for a governmental intrusion to be deemed a search within the meaning of the Fourth Amendment, the party challenging the intrusion must "have exhibited an actual (subjective) expectation of privacy" in that which was intruded upon. Katz, 389 U.S. at 361. Petitioner exhibited no such actual expectation of privacy. See R. at 18–19. Instead, her conduct indicated the opposite—that she was aware that her YOUBER account would be monitored. See R. at 18–19.

In her testimony, Ms. Lloyd was asked whether she and Petitioner shared login information for services and electronic devices. R. at 18. Ms. Lloyd testified that Petitioner "hates being on the 'grid,'" and that Petitioner consistently used Ms. Lloyd's information to sign up for devices and services, and would reimburse Ms. Lloyd in cash. R. at 18. This is the process Petitioner followed in order to rent the YOUBER vehicles that she used in the robberies. R. at 19. In addition, as part of this process, when Ms. Lloyd signed up for YOUBER, she was notified of YOUBER's data collection practices. R. at 20. It is unlikely, given their close and intimate relationship, and given that both women regularly shared accounts and devices, that Petitioner was not informed of YOUBER's data collection practices. See R. at 27. Moreover, even if Petitioner was not made

aware of YOUBER's practices, she would have been required to activate the GPS and Bluetooth features on her phone in order to operate her vehicle, thus putting her on notice that her location was being tracked. See R. at 14 ("The user exchanges such data to lease the property by activating the GPS and Bluetooth functions on their cellular device."). Clearly, Petitioner was aware that her YOUBER account would be "on the grid"—that is that third parties would monitor the account—and therefore used Ms. Lloyd's information to shield her own identity. See R. at 18–19.

Had Petitioner actually, subjectively believed that the information related to her YOUBER account would remain private and would not be "on the grid," Petitioner could have simply used her own information to access YOUBER, eliminating the inconvenience of using Ms. Lloyd's account and reimbursing her in cash. See R. at 18–19. Instead, she took steps to prevent the location data from Ms. Lloyd's YOUBER account from being tied to her own identity. See R. at 18. But, she displayed a subjective awareness that the location of vehicle that she used in the robbery would not remain private, and indeed, that it would likely be monitored. See R. at 18.

B. Even if Petitioner had a subjective expectation of privacy in the location data of her YOUBER vehicle, this expectation of privacy is not one which society is prepared to recognize as reasonable because Petitioner knowingly revealed the data to multiple third parties.

i. The third-party doctrine articulated in Smith and Miller applies to this case.

In its decision in Smith v. Maryland, this Court held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." 442 U.S. at 743–44. The Court has referred to this rule in subsequent years as the "third-party doctrine." See, e.g., Carpenter, 138 S. Ct. at 2216. The Court has held that by revealing information to a third party, an individual in effect "assume[s] the risk that the information would be divulged to police." Smith, 442 U.S. at 745. Critically, "the Fourth Amendment does not prohibit the obtaining of information

revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose." United States v. Miller, 425 U.S. 435, 443 (1976) (holding that individuals have no legitimate expectation of privacy in their bank records).

The inspection of Petitioner's data was similar in nature to the governmental intrusion at issue in Smith and Miller. See Smith, 442 U.S. at 745; Miller, 425 U.S. 435. In Smith, the police installed a pen register (a device which tracks the phone numbers dialed by an individual) at the defendant's phone company after he was suspected of placing threatening phone calls. See id. at 737–38. The pen register revealed that the defendant was indeed placing threatening phone calls, and provided the basis for a warrant to search his residence. See id. The defendant challenged the use of the pen register, arguing that it constituted a search and violated the Fourth Amendment. See id. The Court disagreed, holding that the defendant had no reasonable expectation of privacy in the numbers he dialed, and therefore the Fourth Amendment was not implicated. See id. at 745. The majority found that when Smith used his phone, he "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business," and that by doing so, he "assumed the risk that the company would reveal to police the numbers he dialed." See id. at 744.

In Miller, law enforcement served a subpoena on two banks to obtain the bank records of the defendant, who was involved in the illegal production of whisky. 425 U.S. 437–38. The defendant asserted that law enforcement contravened the Fourth Amendment in their inspection of his private bank papers because "they are merely copies of personal records that were made available to the banks for a limited purpose." Id. at 442. This Court disagreed, holding that the defendant could not assert either ownership or possession of the records. Id. at 440. Instead, this

Court held that the records were "the business records of the banks . . . voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." Id. at 440, 442. Therefore, the Court held that the defendant had no legitimate expectation of privacy in these records, and that by engaging with the bank assumed the risk that they would be revealed to the government. Id. at 443.

Petitioner's use of YOUBER is comparable to the fact patterns at issue in Smith and Miller. See Smith, 442 U.S. at 737; Miller, 425 U.S. 437–38; R. at 14. Just like the defendants in those cases, Petitioner voluntarily exposed her location data to YOUBER. See Smith, 442 U.S. at 742–43; Miller, 425 U.S. at 442; R. at 14. Petitioner was actually aware that she was revealing her location data because she would have had to affirmatively activate the GPS and Bluetooth functions on her cell phone in order to operate the vehicle. See R. at 14. Further, she was constructively aware that she was doing so, through her intimate relationship with Ms. Lloyd, with whom she shared all of her digital accounts. See R. at 18, 27. Like those defendants, Petitioner exposed her information in the ordinary course of business, exchanging her information for the ability to access the service, and knowing that YOUBER employees would likely inspect the information. See Smith, 442 U.S. at 742–43; Miller, 425 U.S. at 442; R. at 14 (finding that "[t]he user exchanges such data to lease the property"). And, like the defendants in Smith and Miller, she assumed the risk that pursuant to a police request YOUBER would divulge her information to law enforcement. See Smith, 442 U.S. at 744–45; Miller, 425 U.S. 443; R. at 14. Thus here, as in Smith and Miller, the Fourth Amendment offers Petitioner no protection. See Smith, 442 U.S. at 745; Miller, 425 U.S. at 444. The third-party doctrine applies to Petitioner's location data, and society is not prepared to recognize any expectation of privacy that Petitioner may have had in her location data as reasonable. See Smith, 442 U.S. at 745; Miller, 425 U.S. at 444. Therefore, governmental

inspection of the data that YOUBER turned over to the government did not constitute a "search" within the meaning of the Fourth Amendment. See Smith, 442 U.S. at 745; Miller, 425 U.S. at 444.

ii. The exception to the third-party doctrine outlined in Carpenter does not apply here because YOUBER collects only a limited amount of location information, and does not implicate the concerns of pervasive police surveillance underpinning Carpenter.

In Carpenter, this Court held that the government's warrantless use of historical cell-site location information (CSLI) collected by phone companies interfered with a reasonable expectation of privacy and was therefore protected by the Fourth Amendment. 138 S. Ct. at 2217. In doing so, the Court created a narrow exception to the third-party doctrine for historical CSLI. Id. at 2220. The Court emphasized that the "cell phone [has become] almost a 'feature of human anatomy,'" and that "while individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time . . . beyond public thoroughfares and into private residences . . . and other potentially revealing locales." Id. at 2218. Noting that cell phones often convey CSLI without any affirmative input by their owners, and do so almost continuously throughout the day, the Court evinced a concern that if police could access historical CSLI without a warrant "only the few without cell phones could escape this tireless and absolute surveillance." See id. Critically, Justice Roberts took pains to highlight that the "decision today is a narrow one . . . *We do not disturb the application of Smith and Miller*… Nor do we address other business records that might incidentally reveal location information." Id. at 2220 (emphasis added).

The location data in Petitioner's case does not rise to the level of concern implicated in Carpenter, and therefore does not fall within Carpenter's narrow exception to the third-party doctrine. See id. at 2218, 2220. Carpenter demonstrated an anxiety about ever-present governmental surveillance due to the pervasiveness of cell phones, and due to the fact that cell

phones constantly send CSLI without any affirmative action on the part of the user. See id. at 2218. In contrast, YOUBER tracks the location information of individuals only while they are inside the YOUBER vehicle, after they take the affirmative steps of renting and entering the vehicle. See R. at 22 ("The GPS and Bluetooth only activates once the YOUBER user's account registers as being within the vehicle."). Additionally, while cell phones are so pervasive in the United States that they outnumber the nation's population, YOUBER has only 40 million users across the country—hardly a number which permits mass surveillance. See Carpenter, 138 S. Ct. at 2218; R. at 2. Unlike CSLI which is tracked throughout a cell phone user's life, YOUBER can only collect location information for, at most, one week at a time (the maximum length of a YOUBER rental). See R. at 23. Finally, unlike CSLI which is collected from cell phones at all times, including when those cell phones cross the threshold into intimate areas protected by the Fourth Amendment, such as the home, YOUBER does not collect any location data once the user leaves the vehicle. See R. at 22.

The limited quantity of location information collected by YOUBER is minute when compared to the vast trove of information provided by historical CSLI data, and it does not raise the specter of an all permeating police surveillance. See Carpenter, 138 S. Ct. at 2218 (finding that "historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle"); R. at 22. The Court noted that its decision in Carpenter was particularly narrow, and that it did not intend to disturb Smith and Miller's application to incidental gathering of location data in the ordinary course of business. See Carpenter, 138 S. Ct. at 2220. Therefore, the exception to the third-party doctrine outlined in Carpenter does not apply to the data collected by YOUBER. See id.

Though Carpenter is the Supreme Court's final decision to date on the warrantless gathering of location data, the decisions of the Circuit Courts of Appeals since Carpenter demonstrate the narrowness of the exception. See, e.g., United States v. Morel, 922 F.3d 1 (1st Cir. 2019) (holding there is no reasonable expectation of privacy in IP address conveyed to internet service provider); United States v. Contreas, 905 F.3d 853 (5th Cir. 2018) (same). For example, in United States v. Hood, the defendant was convicted of transporting child pornography. 920 F.3d 87, 88 (1st Cir. 2018). In that case, the government requested the IP addresses of certain users of the messaging application Kik, which Kik duly provided. Id. at 89. The government then obtained the location information of those IP addresses from internet service providers. Id. The majority (including Justice Souter sitting by designation) held, *inter alia*, that unlike CSLI, "an internet user generates the IP address data that the government acquired from Kik in this case only by making the affirmative decision to access a website or application." Id. at 92. It held that the information in question "in no way gives rise to the unusual concern that the Supreme Court identified in Carpenter." Id.

IP information can reveal many deep and intimate details about an individual's life. It can reveal a person's political ideology based on what news media that person chooses to consume, and it can reveal which religious beliefs they hold based on which, if any, religious websites they visit. It can reveal sexual and dating preferences, consumer preferences, participation in various subcultures, and many other intimate personal details about an individual's life. In contrast, the location information collected by YOUBER reflects only a small portion of the public movements of that individual. See R. at 22. If government inspection of IP address information collected by internet service providers does not rise to the level of concern reflected in Carpenter, then surely

the much more narrow and constrained data collected by YOUBER, which is revealed to YOUBER only through affirmative actions by the user, cannot rise to that level of concern either.

C. Even if the third-party doctrine does not apply to this case, the government's inspection of the location data of Petitioner's YOUBER vehicle did not constitute a search within the meaning of the Fourth Amendment because individuals have a diminished expectation of privacy in the locations of automobiles on public roads.

This Court has consistently held that individuals have a "diminished expectation of privacy in an automobile," and that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." E.g., Knotts, 460 U.S. at 281. This is in light of the fact that "[a] car has little capacity for escaping public scrutiny… [i]t travels public thoroughfares where both its occupants and its contents are in plain view." Id. When an individual enters a YOUBER vehicle to begin his or her rental, YOUBER tracks and stores the vehicle's location. R. at 29. In fact, YOUBER "track[s] the timestamped location of the vehicle . . . regardless of whether the vehicle is rented." R. at 29. It is only natural that a car rental service which rents to individuals without any face-to-face interaction would monitor the location of its vehicles "for security purposes." See R. at 29. In this case, Petitioner had no reasonable expectation of privacy in the location data of her vehicle since the location of her vehicle was already public to anyone who desired to look for it as she travelled on public thoroughfares. See id. In Knotts, the police placed a rudimentary location tracker into a bottle of chloroform which was then conveyed to the defendant. See id. at 277. The police used this beeper to follow the defendant in his vehicle, and later, after the police ended their pursuit, to locate the bottle of chloroform in a secluded cabin. Id. at 278–79. Noting that "visual surveillance from public places along [the] route or adjoining Knotts' premises would have sufficed" to track the defendant, the Court held that "[n]othing in the Fourth Amendment prohibited the police from augmenting the

sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case." Id. at 282. Therefore, the use of the beeper did not constitute a "search" within the meaning of the Fourth Amendment. Id. at 285. In a follow-up case, United States v. Karo, the Court held, under similar facts to Knotts, that the installation of a beeper with the consent of the original owner but without the knowledge of the buyer also did not constitute a "search" within the meaning of the Fourth Amendment. United States v. Karo, 468 U.S. 705 (1984).

Petitioner's case is analogous to Knotts and Karo, despite the fact that technology has evolved since those cases were decided in the early 1980s. See Karo, 468 U.S. at 705; Knotts, 460 U.S. at 276. Here, like in Knotts, a tracking device (or in this case software) was placed on a vehicle which was owned by a third party. See Knotts, 460 U.S. at 276; R. at 29. The police then used that information to track the historical location of the vehicle, as it travelled along public thoroughfares. R. at 4. The tracking of the vehicle did not "push fortuitously and unreasonably into the private sphere protected by the Fourth Amendment," such as into Petitioner's home, because the GPS tracking never proceeded beyond the car. See Knotts, 460 U.S. at 284 (noting that law enforcement takes a risk when relying on such tracking because of the chance it will proceed into a protected area). And the record does not reflect that the vehicle was tracked anywhere that the police could not have physically followed it, had they been surveilling the car on public roads. Accordingly, like the beeper in Knotts, the government's inspection of YOUBER's location data of YOUBER's vehicle did not constitute a search of Petitioner under the Fourth Amendment. See id. at 285.

Petitioner's case is unlike the GPS tracking at issue in United States v. Jones, where this Court held that the government's warrantless installation of a GPS tracker on the defendant's vehicle was an illegal search. See 565 U.S. 400, 404 (2012). In that case, the government physically

installed a GPS tracker on the defendant's vehicle and used it to track the defendant's movements for 28 days. Id. at 402–03. The majority of the Court ruled that this was unconstitutional, not because it invaded a reasonable expectation of privacy, but because the installation of the GPS tracker was a physical intrusion onto private property by the government for the purpose of obtaining information. Id. at 404–05 ("[S]uch a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted."). In Petitioner's case, in contrast, the government did not physically occupy any property, and the concern for common law trespass simply did not exist with respect to the GPS tracking of her YOUBER vehicle. See id.; R. at 22. In fact, the tracking was performed by the very party that owned the property—YOUBER. See R. at 22. In addition, Justice Sotomayor's concurrence, which rejected the property-law foundation of the majority's opinion, argued that when examining GPS monitoring, courts should consider whether a reasonable expectation of privacy exists in the "sum of one's public movements." See Jones, 565 U.S. at 416 (Sotomayor, J. concurring). But the location data provided by YOUBER does not constitute the sum of Petitioner's (or anyone's) public movements in the same way that a personal vehicle might. While GPS tracking of a personal vehicle would reveal almost any location frequented by an individual during the course of the surveillance, YOUBER tracks only those movements taken by an individual who chooses to rent a vehicle from this specific app, and who rents the vehicle for a very limited period of time. See R. at 22; compare Jones, 565 U.S. at 403 (noting that surveillance of Jones took place over four weeks) with R. at 2 (finding that YOUBER vehicles can be rented for at most one week or five-hundred miles). Thus, under both the majority and the concurring opinion, the holding of Jones does not apply to Petitioner's case. See Jones, 565 U.S. at 404, 416. Accordingly, Petitioner had a diminished expectation of privacy in the YOUBER vehicle, and when the government inspected

the location data associated with Ms. Lloyd's YOUBER account, it did not perform a search within the meaning of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the Thirteenth Circuit should be affirmed.